IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

MONDAY, THE 19TH MARCH 2007 / 28TH PHALGUNA 1928

RFA.No. 119 of 2007()

OS.566/2001 of I ADDL.SUB COURT, THRISSUR
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APPELLANT/DEFENDANTS
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1. JOY, S/O. CHIRIYANKANDATH PORINCHU,
AYYANTHOLE VILLAGE DESOM, THRISSUR DISTRICT.

2. MANJU, W/O. JOY,
-DO- -DO-

BY ADV. SRI.N.SUBRAMANIAM
SRI.M.S.NARAYANAN

RESPONDENT: PLAINTIFF

LEENA BABU, W/O. BABU,
KOLENGADAN HOUSE, AYYANTHOLE VILLAGE,
THRISSUR DISTRICT.

BY ADV. SRI.MILLU DANDAPANI

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 19/03/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

KURIAN JOSEPH & K.T.SANKARAN,JJ.

R.F.A.No.119 of 2007 &
C.M.Appln.No.347 of 2007

Dated this the 19th day of March, 2007

JUDGMENT

Sankaran,J.

C.M.Appln.No.347/2007. This is an application to condone the delay of 1351 days in filing the appeal. The appeal arises out of O.S.No.566/2001 on the file of the Court of the Subordinate Judge, Thrissur filed by the respondent for return of the Ambassador car bearing registration No.KLD 9119 with an alternative prayer for passing a decree for Rs.1,50,000/-, in case it is found that the prayer for return of the car could not be allowed. The suit was filed on 3-7-2001 and was posted on 3-12-2001. On that date, the defendants, who are the petitioners herein, were absent and they were set ex parte. I.A.No.5691/2001 was filed by them under Order IX Rule 13 of the Code of Civil Procedure. But that application was dismissed for default on 11-11-2002. Thereafter several applications were filed and finally the court below passed an order permitting the defendants to file written statement within fifteen days and the case was posted

to 21-2-2003. On that date no written statement was filed. The defendants were also absent on that day. Again they were set ex parte. An ex parte decree was passed on 7-3-2003.

2. Again the defendants filed I.A.No.2612/2004 under Order IX Rule 13 of the Code of Civil Procedure to set aside the ex parte decree. There was delay of 468 days in filing the application. The court below dismissed that application and consequently dismissed the main application filed under Order IX Rule 13 of the Code of Civil Procedure. Challenging that order F.A.O.No.79 of 2006 was filed by the defendants, which was dismissed as per the judgment dated 22nd June, 2006. Though the defendants filed R.P.No.555/2006 to review that judgment, that was also dismissed as per the order dated 17-7-2006. It is submitted that S.L.P.No.21252/2006 filed against the judgment in F.A.O.No.79/2006 as well as the order in the Review Petition was dismissed by the Hon'ble Supreme Court on 5-1-2007.

3. As stated earlier this appeal is filed against the judgment and decree passed by the trial court by which the court below granted a decree for Rs.1,59,550/- in favour of the respondent. It is stated in the

affidavit accompanying C.M.Appln.No.347/2007 that on getting information of the dismissal of the Special Leave Petition, application was filed for issue of certified copy of the judgment and decree on 15-1-2007, stamp papers were called for on 14-2-2007 and it was deposited on the same day. It is also stated that the judgment was ready on 15-2-2007 and it was delivered on the same day. Excluding the period of 90 days, the time prescribed for filing an appeal, the petitioners stated that there is a delay of 1362 days in the affidavit and 1351 days in the petition. It is stated in the affidavit that the delay occurred due to the fact that the petitioners prosecuted the application under Order IX Rule 13 of the Code of Civil Procedure, which went up to the Supreme Court and that they were prosecuting the proceedings bona fide in a court which was competent to grant the relief. It is contended that the time spent in prosecuting the proceedings under Order IX Rule 13 shall be excluded under Section 14 of the Limitation Act. The counter affidavit is filed by the respondent wherein it is stated that the petitioners are not entitled to compute the period of limitation after deducting the time taken for prosecuting the

proceedings under Order IX Rule 13 of the Code of Civil Procedure. It is contended that there is no bona fides on the part of the petitioners and that there is no sufficient reason for condoning the delay. It is also stated that steps were taken for realising the amount decreed by attachment and sale of the property belonging to the petitioners and at that time W.P(C)No.1953/2007 was filed by the petitioners. In that writ petition it was stated that steps were being taken to file the appeal.

4. The contention of the petitioners that they are entitled to exclude under Section 14 of the Limitation Act the period which they were prosecuting the proceedings under Order IX Rule 13 of the Code of Civil Procedure, cannot be accepted at all. Section 14(1) says that in computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. It is well settled that Section 14 applies to

appeals as well. The necessary ingredient to attract Section 14(1) is that another civil proceeding must have been pending and it was being prosecuted in good faith, but due to defect of jurisdiction or other cause of a like nature the court was unable to entertain and grant the relief therein. In the case on hand the petitioners were prosecuting the application under Order IX Rule 13 of the Code of Civil Procedure. That application was not dismissed on the ground of defect of jurisdiction, but on the merits hold that there was no ground to condone the long delay in filing the application. The appeal therefrom was also dismissed on the merits. Therefore, the primary ingredient to attract Section 14(1) of the Limitation Act is absent in the present case and therefore, there is no question of any exclusion as contemplated under Section 14(1) of the Act. Section 14(2) does not apply at all because what is being prosecuted is not an application, but an appeal. Even if it is to be contended that Section 14(2) applies, then the test is rigorous that the application which is being prosecuted now and which was being prosecuted must be for the same relief, which is absolutely absent in this case. Therefore, the contention of the appellant that Section 14

of the Limitation Act is to be applied in the case is without merit. The petitioners were not diligent in defending the suit. Though sufficient opportunity was granted to them to file the written statement after setting aside the ex parte decree on two occasions, they did not file the written statement and prosecute the case with diligence. The attempt of the petitioners is only to protract the proceedings and cause delay in the execution of the decree. The application is devoid of merits and it is accordingly dismissed.

5. Since the application for condonation of delay in filing the appeal is dismissed the R.F.A is also dismissed.

(KURIAN JOSEPH, JUDGE)

(K.T.SANKARAN, JUDGE)

ahg.